U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433-2846

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 17 January 2007

CASE NO.: 2006-LDA-89

OWCP NO.: 02-141999

IN THE MATTER OF

R.D.,
Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL, INC.,
Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier

APPEARANCES:

Gary B. Pitts, Esq.
On behalf of Claimant

Richard L. Garelick, Esq.
On behalf of Employer/Carrier

Before: Clement J. Kennington,
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. § 901, *et. seq.*, and its extension, the Defense Base Act ("DBA"), 42 U.S.C. § 1651, *et. seq.* brought by R.D. ("Claimant") against Service Employers International, Inc. ("Employer") and Insurance Company of the State of Pennsylvania ("Carrier"). The issues raised by the parties could not be resolved administratively, and the matter was referred to the

undersigned in the Office of Administrative Law Judges for a formal hearing. The hearing was held on August 17, 2006 in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced seventeen (17) exhibits, which were admitted, including: medical records, medical bills, LS-203, LS-207, LS-208, LS-209, and LS-18 forms, Claimant's 2004 income tax return, Claimant's 2004 W-2, Claimant's 2005 W-2, 2005 itemization of payments to Claimant from Employer, Claimant's Interrogatories to Employer together with Employer's Answers, Claimant's Requests for Admissions to Employer together with Employer's Responses, Claimant's Request for Production to Employer together with Employer's Responses, and deposition transcript of November 2, 2006 deposition of Robert P. Hayes, M.D..[1]

Employer/Carrier introduced eleven (11) exhibits, which were admitted, including: medical records, October 4, 2005 report prepared by Dr. Edward Brandecker, November 1, 2005 report prepared by Dr. Brandecker, November 9, 2005 report prepared by Dr. Brandecker, November 17, 2005 report prepared by Dr. Paul McDonough, December 13, 2005 report prepared by Dr. Bryan Drazner, March 6, 2006 report prepared by Dr. Robert P. Hayes, Claimant's pre-injury wage records, deposition transcript of August 16, 2006 deposition of Claimant, and deposition transcript of September 21, 2006 deposition of Dr. Drazner.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness' demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

The parties stipulated and I find:

1. Claimant suffered an injury to his lower back on May 6, 2005;

2. An employer/employee relationship existed at the time of Claimant's injury;

3. Employer/Carrier received notice of Claimant's injury on May 7, 2005;

4. Employer/Carrier filed a Notice of Controversion on July 5, 2005, November 2, 2005, February 8, 2005, and March 30, 2006;

[1] References to the transcripts and exhibits are as follows: trial transcript - Tr.__; Claimant's exhibits - CX-__, p.___; Employer/Carrier's exhibits - EX-___, p.__; Administrative Law Judge exhibits - ALJX-___, p.__; Employer/Carrier's and Claimant's exhibits also contained many duplicates as indicated below. Where duplicates exist, references will generally be made to only one exhibit. The following exhibits were duplicates: CX-1, p. 2 and EX-1, p. 11; CX-1, pp. 3-4 and EX-1, pp. 14-15; CX-1, p. 5 and EX-1, p. 16; CX-1, p. 6 and EX-1, p. 34; CX-1, p. 7 and EX-1, p. 35; CX-1, p. 8 and EX-2, p. 1; CX-1, p. 9 and EX-3, p. 1; CX-1, p. 10 and EX-4, p. 1; CX-1, p. 12 and EX-5, p. 1; CX-1, pp. 13-20 and EX-6, pp. 1-8; CX-1, pp. 21-24 and EX-7, pp. 1-4.

5. An informal conference was held on May 9, 2006;

6. Claimant's average weekly wage at the time of his injury was $1675.00; and

7. Employer/Carrier paid temporary total disability compensation of $1,047.16 per week to Claimant from May 26, 2005 to October 31, 2005, and also provided Claimant with medical benefits. (ALJX-1, p. 1).

II. ISSUES

1. Whether Claimant was injured in a zone of special danger;

2. The nature and extent of Claimant's disability;

3. Determination as to when, or if, Claimant reached maximum medical improvement; [2]

4. Whether Claimant is entitled to temporary total disability compensation from November 1, 2005 to present and continuing;

5. Reasonableness and necessity of recommended surgery; and

6. Attorney's fees and interest.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant signed a contract of employment with Employer/Carrier and left Houston, Texas for employment in Iraq on June 12, 2004. Claimant arrived in Iraq on June 13, 2004 and was stationed in Kuwait. Claimant was initially employed by Employer/Carrier as a tanker driver, but was later promoted to convoy commander after an attack on a convoy on September 28, 2004 fatally injured his convoy commander. As both tanker driver and convoy commander, Claimant transported fuel from Kuwait to different military bases in Iraq.

On May 6, 2005, Claimant's front steer tire blew out while his convoy was traveling through a hostile area. Claimant, his driver and a few other drivers in his convoy got out of their trucks to replace the tire. Claimant used a lug wrench and cheater pipe to change the tire as he had no air or pneumatic tools at his disposal. In order to tighten and loosen the lug nuts,

[2] If it is determined that Claimant has reached maximum medical improvement, the extent of Claimant's loss of wage-earning capacity would also then be an issue.

Claimant had to apply all his body weight to pull and stand on the cheater pipe. While Claimant was changing the tire, a military escort in the convoy fired a flare to illuminate an area to the right of the convoy where an Iraqi truck was seen. The Iraqi truck fled the area as the escort prepared to fire at it. Claimant hurried to change the truck tire because he believed the convoy was going to come under attack. In order to change the tire quickly, Claimant had to exert himself more so than he would have under ordinary circumstances.

On May 7, 2005, Claimant awoke with pain in his back and discovered he was unable to stand or lay down straight. Claimant believes his pain and postural problems are the result of his overexertion in changing the truck tire on May 6, 2005. Claimant continued to work for Employer until late May, 2005, when he returned to the United States for treatment of his back pain.

Claimant filed a claim for compensation on December 12, 2005. Employer/Carrier paid Claimant temporary total disability up to November 1, 2005 when Claimant was released to full duty by one of his physicians. Claimant met with this physician who informed Claimant he mistakenly released him to full duty. Claimant wishes to undergo back surgery as recommended by his physician and to have his temporary total disability compensation reinstated retroactive to November 1, 2005.

B. Medical Records

KBR Health Records

On May 8, 2005, Claimant saw Lewis French, a paramedic, and presented with complaints of low back pain with a pain range on a scale of one (1) to ten (10) of six (6) to ten (10). Claimant informed Mr. French that he began to experience back pain after he changed his truck tire and that the pain was aggravated the following day by his travel over bumpy roads. On examination, Mr. French noted Claimant had limited range of motion of 45° flexing forward and 15° twisting to left side. Mr. French diagnosed Claimant as suffering from lower back strain. Claimant was prescribed Flexeril and told to rest. (EX-1, p. 1).

On May 17, 2005, Claimant saw John McDaniel, a paramedic, and presented with complaints of low back pain, radiating to his right side. Physical examination of Claimant's back revealed palpable muscle tightness. The examination also revealed Claimant had a limited range of motion of 15° bending backward and 20° twisting to his right side. Claimant reported that bending forward eased his pain. Mr. McDaniel diagnosed Claimant as suffering from lumbar strain and prescribed Skelaxin and Ibuprofen for him. (EX-1, p. 2).

Mr. McDaniel saw Claimant again on May 20, 2005. Claimant presented at this appointment with complaints of severe low back pain, radiating down his right hip and leg. On physical examination, Mr. McDaniel noted Claimant was in obvious pain and that his skin was pink, warm, and dry. Mr. McDaniel also noted Claimant's range of motion had not improved and that his pain was worsening. Claimant reported that his position of comfort was seated and leaning forward. Mr. McDaniel diagnosed Claimant as suffering from lumbar strain as well as a

possible pinched nerve in the lumbar region. Claimant was prescribed Flexeril and Naproxen and was placed on bed rest for three (3) days. (EX-1, pp. 4-5).

On May 22, 2005, Claimant saw Mr. McDaniel once more and complained of low back pain and numbness in his right leg. On physical examination, Mr. McDaniel noted Claimant was in obvious pain and that his skin was pink, warm, and dry. Mr. McDaniel also noted Claimant's condition was not improving with treatment. Mr. McDaniel diagnosed Claimant as suffering from lumbar strain as well as a possible pinched nerve. Mr. McDaniel recommended Claimant be transported to Tallil Air Force Base for x-rays and further evaluation by a physician. (EX-1, p. 8). Subsequently, Claimant reported to Dr. West at Tallil complaining of low back pain, radiating down his right leg and numbness in his right foot. After performing a physical examination of Claimant, Dr. West determined Claimant was suffering from acute low back pain with radiculopathy, diabetes, and obesity. (EX-1, p. 7). An x-ray of Claimant's back revealed possible retrograde spondylolysis. (EX-1, p. 9). Dr. West recommended a MRI of Claimant's back be obtained. (EX-1, p. 7). Claimant was placed on light duty and was restricted from participating in convoys, wearing a flak vest, or lifting anything over twenty (20) pounds. Claimant was also told he could return to duty on May 25, 2005. (EX-1, p. 10).

Stamford Memorial Hospital

On May 27, 2005, Claimant had a MRI taken of his back. The MRI revealed Claimant had a hemangioma at L3 vertebral body as well as degenerative end-plate changes at L4-5 and at L2-3 levels. The MRI also revealed Claimant suffered from a broad based annular bulge as well as hypertrophic changes in facet joints possibly causing moderate right lateral recess stenosis at the L2-3 level which might impinge upon the L3 nerve root. In addition, the MRI showed Claimant had hypertrophic changes in facet joints in addition to an extruded disc at the L3-4 level which likely impinged upon L4 and/or L5 nerve roots. The MRI also showed at the L4-5 level that Claimant suffers from hypertrophic changes in facet joints as well as ligamenta flavum combined with posterior end plate osteophyte causing severe central canal and lateral recess stenosis. (CX-1, p. 2).

On July 20, 2005, Claimant reported to a physical therapist with complaints of constant back pain and constant numbness in his right foot. The therapist noted Claimant displayed decreased range of motion and strength. (EX-1, p. 25). On July 25, 2005, Claimant again reported to his physical therapist for treatment and complained of tingling in his foot. The therapist noted Claimant's flexibility was improving but was still restricted. (EX-1, p. 26). The therapist also noted Claimant at that point had not undergone enough physical therapy to realize a benefit. (EX-1, p. 27). Claimant's next appointment with his physical therapist was on July 27, 2005. At this appointment, Claimant reported no change in his back pain. The therapist noted Claimant's flexibility and strength were improving but were still restricted. (EX-1, p. 28). On July 28, 2005, Claimant reported again to his physical therapist with complaints of a sore and stiff back. The therapist noted Claimant's flexibility and strength were improving but were still restricted. The therapist also noted Claimant's response to treatment was slower than expected. (EX-1, p. 30).

Claimant's next appointment with his physical therapist was on August 1, 2005. Claimant presented at this appointment with complaints of no change in his back pain. The therapist noted Claimant's active range of motion, flexibility, and strength were improving but were still restricted. The therapist also noted Claimant's response to treatment was slower than expected. (EX-1, p. 31). On August 3, 2005, Claimant reported to his physical therapist with complaints of experiencing pain on August 2, 2005 as well as on the morning of August 3, 2005. The therapist noted Claimant reported minimal, if any, change in his pain and discomfort since beginning therapy. The therapist also noted Claimant had decreased range of motion and flexibility as well as decreased lumbar strength. Claimant's therapist recommended suspending therapy pending further evaluations by Drs. McDonough and Brandecker. (EX-1, pp. 32-33).

Michael W. Hart, M.D.

Claimant met with Allana Hicks, a nurse practitioner with Dr. Hart's office, on May 27, 2005. Claimant told Nurse Hicks that he injured his back on May 6, 2005 while he was in Iraq. According to Claimant, he strained his back when he replaced his truck's tire on May 6, 2005 and has experienced constant back pain since then. Claimant complained of numbness in his right foot to Nurse Hicks. Nurse Hicks diagnosed Claimant as suffering from lumbar radiculopathy and referred Claimant for a MRI. (EX-1, p. 12).

On June 9, 2005, Claimant met again with Nurse Hicks and complained of back pain as well as numbness in his right foot. Claimant requested a referral to an orthopedic specialist. Nurse Hicks noted that Claimant had been referred to Dr. McDonough, but apparently an appointment had not yet been set. Consequently, Nurse Hicks scheduled an appointment for Claimant to see Dr. McDonough. (EX-1, p. 13).

Orthopedic Associates

Claimant met with Paul W. McDonough, M.D., P.A. on June 16, 2005. Claimant presented at his appointment with Dr. McDonough with complaints of back pain, radiating down his right leg. Upon examination of Claimant and Claimant's radiographic films, Dr. McDonough concluded Claimant suffered from right lower extremity radiculopathy, back pain, L3-4 extruded disc herniation with right sided neurogenic impingement, L2-3 disc herniation, and L4-5 grade I spondylolisthesis. (CX-1, p. 3). Dr. McDonough recommended Claimant undergo conservative treatment including epidural injections. However, Dr. McDonough noted that should Claimant remain refractory to conservative treatment, he would re-evaluate Claimant's course of treatment and consider other treatment options, including surgery. (CX-1, p. 4).

Claimant next met with Dr. McDonough on August 4, 2005. Claimant reported some improvement in his leg and back pain, but still complained of some numbness in his right foot and of some significant back pain. After examining Claimant and his radiographic films, Dr. McDonough concluded Claimant suffered from significant grade 1 spondylolisthesis with stenosis, a L3-4 disc herniation, back pain, and improving right lower extremity radiculopathy. Dr. McDonough recommended Claimant continue his conservative treatment with Dr. Brandecker and noted Claimant would likely be a candidate for surgery, namely, a L3 to L5 decompression and L4-5 fusion, in the future. (CX-1, p. 6).

Claimant's next appointment with Dr. McDonough was on November 17, 2005. Claimant presented with complaints of back pain with radiating pain down his right leg and persistent numbness in his right foot. Following a physical examination of Claimant, Dr. McDonough determined Claimant suffered from grade I L4-5 spondylolisthesis, right L3-4 disc herniation, persistent right lower extremity radiculopathy that is refractory to conservative treatment, and back pain. Claimant expressed his desire for consideration for surgical treatment. Dr. McDonough discussed the risks and benefits of surgery and obtained Claimant's informed consent. (CX-1, p. 12).

Spine Abilene

Claimant met with Edward Brandecker, M.D. on June 21, 2005 on referral from Dr. McDonough. Claimant told Dr. Brandecker that he injured his back driving over rough roads in Iraq. Claimant complained to Dr. Brandecker of lower back pain and numbness in his right foot. Claimant informed Dr. Brandecker that his back pain lessened when he sat down and increased when he stood up or walked. (EX-1, p. 18). Upon examination of Claimant and Claimant's radiographic films, Dr. Brandecker concluded Claimant suffered from L3-4 disc herniation with thecal sac compression and L3-4 and L4-5 spinal stenosis. Dr. Brandecker recommended Claimant undergo physical therapy as well as a right L4-5 transforminal epidural steroid injection. (EX-1, p. 19). Dr. Brandecker administered an epidural steroid injection to Claimant on June 28, 2005. (EX-1, pp. 21-22).

After receiving his epidural steroid injection, Claimant met with Dr. Brandecker for a follow-up appointment on July 8, 2005. Claimant told Dr. Brandecker that he was no longer experiencing radicular pain. Instead, Claimant complained of only mechanical low back pain. Dr. Brandecker concluded Claimant did not require another epidural steroid injection at that time and recommended instead that Claimant undergo physical therapy and a course of oral Prednisone. (EX-1, p. 22). Claimant met with a physical therapist on July 14, 2005. Claimant told the therapist he injured his back when he changed a steering tire on an eighteen wheeler while working in Iraq. Claimant presented to the therapist with complaints of back pain and numbness in his right foot. The therapist noted Claimant displayed decreased range of motion and strength. The therapist also noted Claimant had low tolerance to transitional postures as Claimant was unable to stand or sit for an extended period of time. (EX-1, p. 23).

On July 27, 2005, Claimant met again with Dr. Brandecker. Claimant presented to Dr. Brandecker with complaints of some episodic radicular symptoms with lumbar extension as well as lower back pain and numbness in his right foot. Dr. Brandecker noted Claimant expressed a desire to undergo surgical treatment for his back pain. Dr. Brandecker, however, recommended Claimant continue to undergo physical therapy and suggested, at that time, surgery was not Claimant's best course of treatment for his back pain. Dr. Brandecker recommended Claimant pursue a follow-up consultation with Dr. McDonough. (EX-1, p. 29). Claimant's next appointment with Dr. Brandecker was on October 4, 2005. Claimant presented to Dr. Brandecker with complaints of lumbar stiffness, numbness in his right foot, and discomfort with prolonged driving. After examining Claimant, Dr. Brandecker concluded Claimant reached maximum medical improvement as to his back injury. Dr. Brandecker noted Claimant had a

follow-up appointment with Dr. McDonough regarding surgery and that Dr. McDonough found no need for immediate surgical treatment. Dr. Brandecker noted, however, that surgery might be required in the future. (CX-1, p. 8).

Following his examination of Claimant on October 4, 2005, Dr. Brandecker provided Employer/Carrier with a letter dated November 1, 2005 wherein Dr. Brandecker informed Employer/Carrier that he was of the opinion that Claimant could be released to full duty. (CX-1, p. 9). On November 9, 2005, Dr. Brandecker met with Claimant to discuss his release to full duty. Dr. Brandecker determined after meeting with Claimant that he was unable to assign the type of work Claimant could perform since Claimant still complained of lumbar stiffness as well as numbness in his foot and since a functional capacity evaluation had not been performed. Dr. Brandecker also determined that a functional capacity evaluation could not be performed at that time as Claimant was recovering from a total hip replacement. Consequently, Dr. Brandecker recommended deferring a finding regarding Claimant's specific work activity level until a future date. (CX-1, p. 10).

C. Testimony

Claimant's Testimony

Claimant is a fifty-two (52) year old male with a high school education who currently resides in Stamford, Texas. (Tr. 17; EX-10, pp. 21-22, 33-34, 80). He is 6'5" tall and weighs approximately 295 pounds. (Tr. 29; EX-10, p. 16). Claimant's family has a history of cancer, heart disease, and emphysema. Aside from those conditions, Claimant knows of no family history of respiratory diseases, neurological conditions, or psychological problems. (EX-10, pp. 15-16).

Claimant possesses a commercial driver's license ("CDL") issued by the State of Texas. He previously possessed a CDL, which was referred to at that time as a chauffer's license, in the 1970's to the mid 1980's. (EX-10, p. 18). His employment history includes work as a mechanic for Autocraft Shop, a mechanic for Ray's Automotive, security guard for Jackson Perkins, military service during which he was stationed in Kentucky, Germany, and Louisiana, roustabout and as a roughneck for Mallard Drilling, house framer and installer of cable for televisions, production floor work for Boise Cascade, and cross-country hauler for Prime Trucking. (Tr. 18-19; EX-10, pp. 22-29).

Claimant became aware of job opportunities in Iraq being offered through Employer and applied for a position in March, 2004. (EX-10, pp. 32, 35). As part of the application process, Claimant was required to attend an orientation meeting in Houston. (EX-10, p. 35). During the orientation meeting, Claimant submitted to a physical exam in which he disclosed he was taking Ultram for his knee. (Tr. 32; EX-10, pp. 35-36). Claimant was told he could not take Ultram to Iraq. Consequently, Claimant returned home, discontinued his use of Ultram for thirty (30) days, and obtained a release from a physician. Claimant then returned to Houston in approximately June of 2004 for another orientation meeting. At this meeting, Claimant signed a contract of

employment with Employer and left Houston, Texas for Iraq on June 12, 2004. (Tr. 19; EX-10, p. 36). Claimant arrived in Iraq on June 13, 2004. (Tr. 19).

Claimant worked for Employer as a tanker driver. (Tr. 19; EX-10, pp. 36, 38). He was stationed in Kuwait and transported fuel from Kuwait to different military bases in Iraq. Claimant worked twelve (12) hour days, seven (7) days a week for four (4) months. After which he received either ten (10) days off or two (2) days off on either end. While working in Kuwait, Claimant wasn't required to wear a flak vest or a helmet. (EX-10, p. 38). However, as soon as Claimant crossed over into Iraq he was required to wear both a flak vest and a helmet. (EX-10, pp. 38-39). According to Claimant, flak vests weigh between forty (40) to sixty (60) pounds. (EX-10, p. 39).

Claimant's convoy commander was Roger Moffat. On September 28, 2004, Claimant along with his convoy commander, was on a mission to deliver fuel to Taji. At approximately 10:00 p.m. while the convoy was en-route to Taji, an improvised explosive device ("IED") was detonated and the convoy came under small arms fire. The lead vehicle in the convoy was engulfed in flames and the convoy came to a stop. Roger Moffat was in the lead vehicle and was fatally injured. (Tr. 19-20; EX-10, p. 46). Following this attack, Claimant moved his truck to the lead and led the remainder of the convoy to Taji. (EX-10, pp. 46-47). Claimant was promoted to convoy commander following this attack and death of his convoy commander, Roger Moffat. (Tr. 19).

As convoy commander, Claimant was assigned a driver as well as the lead vehicle in the convoy and served as "go-between" for Employer's employees. (Tr. 20, 22). Claimant was also entrusted with the care of his convoy drivers and had to ensure they all adequately cared for themselves. (Tr. 20-21). In addition, Claimant was responsible for maintaining contact with the military escorts assigned to his convoy. (Tr. 21). Typically, Claimant served as convoy commander for a convoy of thirty (30) trucks and three (3) military escorts for fuel deliveries from Kuwait to Southern Iraq and for a convoy of fifteen (15) trucks, including one bobtail, a tractor without a trailer, and three military escorts for fuel deliveries to Baghdad or Northern Iraq. (Tr. 21, 24-25). Smaller convoys were used for fuel deliveries to Baghdad and Northern Iraq as those areas were considered war zones and since smaller convoys were easier to maintain control over in case of an emergency. (Tr. 24-25).

On May 6, 2005, Claimant led a convoy of fifteen (15) tankers and three (3) military escorts back from Baghdad on the main supply route ("MSR") Tampa. (EX-10, pp. 39-40, 45). One of the fifteen (15) tankers was a bobtail whose responsibility it was to either tow a disabled tanker or rescue another driver should the convoy come under attack. (Tr. 21; EX-10, p. 40). The convoy's military escorts consisted of three (3) Humvee vehicles with three (3) armed military personnel in each Humvee. One Humvee would lead the convoy, while another was positioned in the middle of the convoy to run up and down the length of the convoy. The final Humvee was positioned in the rear of the convoy. (EX-10, p. 40). Unlike their military escorts, Claimant and Employer's other employees were required to be unarmed. (Tr. 25; EX-10, p. 41). According to Claimant, convoys on the MSR were spaced between three (3) to five (5) truck lengths apart. (EX-10, p. 42).

At approximately 10:00 p.m. on May 6, 2005, Claimant's front steer tire blew out while the convoy was traveling along MSR Tampa in a hostile area known for IEDs, the same route where Claimant's former convoy commander, Roger Moffat, was fatally injured. (Tr. 25-26; EX-10, pp. 43, 45, 47). Claimant notified his military escort as well as transportation operation officials that he had to stop the convoy. (Tr. 26; EX-10, pp. 43-44). Claimant then requested that the bobtail pull up to the front of the convoy near his truck. (Tr. 26; EX-10, pp. 44-45). Because of the size and heft of tanker truck tires, the tire alone weighs a couple of hundred pounds, Claimant and his driver as well as a few other drivers in the convoy got out of their trucks to replace Claimant's front steer tire. (Tr. 28-29; EX-10, p. 47). Claimant did not have air tools or pneumatic tools to use to change the tire. Consequently, Claimant had to change the tire by hand using a lug wrench and cheater pipe. In doing so, Claimant had to use all his weight to pull and stand on the cheater pipe to break the lug nuts loose as well as to tighten the lug nuts. (Tr. 27-28, 30; EX-10, p. 50).

During the process of changing Claimant's tire, the lead military escort fired off a flare. The escort fired the flare because they saw an Iraqi truck to the right of the convoy. The Iraqi truck fled the area as the escort prepared to fire a .50 caliber gun at the truck. Claimant hurried to change the tire of his truck because he believed the convoy was going to come under attack. (Tr. 27; EX-10, pp. 47, 49-50). Claimant spent approximately fifteen (15) minutes repairing the tire. (Tr. 30-31; EX-10, pp. 50-51). Under ordinary circumstances, Claimant would have spent between twenty (20) to thirty (30) minutes to repair the tire. (Tr. 31). In order to change the tire so quickly, Claimant exerted himself more so than he would have under ordinary circumstances. (Tr. 30-31; EX-10, p. 50). After changing the tire, Claimant was able to return to camp in Kuwait, arriving around 1:00 or 2:00 a.m. on May 7, 2005. (Tr. 30; EX-10, p. 48).

Claimant did not feel any pain or discomfort on May 6, 2005 after he changed his truck's tire. (Tr. 37; EX-10, pp. 48-49). Rather, Claimant awoke the next morning unable to stand completely straight. (Tr. 33, 37; EX-10, p. 49). Claimant went to the camp medic who prescribed either Flexeril or Ibuprofen for him and placed him on bed rest for three (3) days. (Tr. 33; EX-10, p. 49). Claimant did not experience any relief from his back pain while in Iraq. Claimant continued to work for three weeks despite his inability to stand straight or lay down flat. (Tr. 33, 37-38, 40; EX-10, p. 51). Eventually, Claimant complained of losing feeling in his right foot after which he was sent to see a medical officer at Talill Air Force Base. The medical officer gave Claimant an injection and ordered an x-ray of Claimant's back. (Tr. 33, 40; EX-10, p. 51). From the x-ray, the medical officer determined Claimant needed a MRI. Claimant was sent back to the United States for a MRI. (Tr. 33; EX-10, p. 52). Claimant returned to the United States on either May 27 or 28, 2005. (EX-10, p. 54). According to Claimant, the pain from which he suffered following his injury on May 6, 2005, on a scale of one (1) to ten (10) was a ten (10). (Tr. 40).

Upon his return to the United States, Claimant was referred to Dr. McDonough, an orthopedist, by his treating nurse practitioner. (Tr. 34; EX-10, p. 53). A MRI of Claimant's back was ordered and showed Claimant suffered from a herniated disc. (Tr. 34). Claimant discussed surgery for his back with Dr. McDonough. Dr. McDonough went so far as to schedule Claimant for surgery in January, 2006, but had to cancel the surgery after Employer/Carrier

refused to authorize the procedure. (EX-10, p. 60). Claimant last saw Dr. McDonough in either November, or December, 2005. (EX-10, p. 61).

In addition to treating Claimant, Dr. McDonough also referred Claimant to Dr. Brandecker for epidural injections. (EX-10, p. 53). Claimant received approximately two (2) epidural injections from Dr. Brandecker and was also prescribed physical therapy. (EX-10, p. 54). On November 1, 2005, Dr. Brandecker released Claimant to full duty. (EX-10, p. 58). Claimant was unaware of this release until he was notified of the release by Employer/Carrier. After learning of the release, Claimant returned to Dr. Brandecker and asked if he could lift weights or go back to driving a truck cross-country. Dr. Brandecker told Claimant he could do neither. Claimant then asked Dr. Brandecker why he had released him to return to full duty. Dr. Brandecker told Claimant he had made a mistake and would rectify the mistake with Employer/Carrier. (EX-10, p. 59).

From May, 2005, to October, 2005, Claimant's back pain improved slightly. During that time period, Claimant was able to straighten his back which he believed was attributable to his medication, Norco. (EX-10, pp. 54-55). Other than this slight improvement, Claimant stated he suffers constant pain and discomfort from his back which causes him to take three (3) to six (6) pain pills a day. (EX-10, p. 75). According to Claimant, the pain he suffers on a daily basis on a scale of one (1) to ten (10) ranges between four (4) to six (6) but sometimes is as bad as an eight (8). (EX-10, p. 76). All Claimant is basically able to do all day is lay around. Sitting or standing for any lengthy duration causes Claimant to suffer pain and discomfort. (EX-10, p. 77). Prior to suffering back pain as a result of his May 6, 2005 injury, Claimant had not had any major problems with back pain. (Tr. 31-32; EX-10, p. 68). Claimant has not worked, or looked for work since his return to the United States. Claimant wishes to have surgery on his back and to have his temporary total disability compensation reinstated retroactive to November, 2005. (Tr. 36; EX-10, p. 63).

Besides experiencing back pain, approximately two (2) months after he returned to the United States Claimant began experiencing pain in his hip. Dr. Brandecker told Claimant he had arthritis in his hip and his hip pain was not related to his back pain.[3] In October, 2005, Claimant underwent hip surgery. Prior to this time, Claimant had not had problems with his hip.[4] (EX-10, p. 56). Claimant was pleased with the results of the surgery and has not recently had any problems with his hip. (EX-10, p. 58).

Employer/Carrier sent Claimant to see Dr. Drazner. (EX-10, p. 60). Claimant was not impressed with Dr. Drazner. (Tr. 34-35; EX-10, p. 61). According to Claimant, Dr. Drazner made several questionable assertions in his report regarding Claimant, including stating Claimant did not report his injury and Claimant did not bring his MRIs with him for Dr. Drazner to review.

[3] Claimant is currently not seeking compensation or benefits for his hip problems as a result of his May 6, 2005 injury. (EX-10, pp. 57-58).

[4] Besides undergoing hip surgery, Claimant has in the past undergone surgery for his knees, hernias, and for a stab wound to his stomach. (EX-10, pp. 65-68). Claimant also suffers from hammertoes, varicose veins, and diabetes. (EX-10, pp. 69-71). In addition, Claimant has previously suffered from gout and bronchial pneumonia. (EX-10, pp. 70-71).

In addition, Claimant was uncomfortable with what he perceived to be a herding in and out of patients from Dr. Drazner's office. (Tr. 35; EX-10, p. 61). After being evaluated by Dr. Drazner, Claimant was referred by the Department of Labor to Dr. Hays for evaluation. (Tr. 34-35). Dr. Hays reviewed Claimant's MRI and concluded Claimant suffers from a herniated disc. (Tr. 35). Dr. Hays recommended Claimant undergoes surgery to fuse the affected area of his spine. (Tr. 36).

Deposition Testimony of Bryan S. Drazner, M.D.

Bryan S. Drazner, M.D. earned a bachelor's degree from University of Pennsylvania and a doctor of medicine from State University of New York. Dr. Drazner completed residencies in the State University of New York Health Sciences Center, University of Maryland Medical Systems, and University of Illinois system. (EX-11, pp. 37-38). Currently, Dr. Drazner maintains a physical medicine and rehabilitation practice in Dallas, Texas where he has practiced medicine for approximately fifteen (15) years. (EX-11, pp. 5, 37-38).

Dr. Drazner examined Claimant at Employer's request and concluded Claimant suffers from widespread degenerative disc disease from L2-3 through L4-5. (EX-11, pp. 5, 9; CX-1, pp. 19-20). Dr. Drazner based his conclusion on his physical examination of Claimant as well as on Claimant's medical records, including a MRI of Claimant's back from Stamford Hospital. (EX-11, pp. 6-9, 18). According to Dr. Drazner, Claimant's MRI showed broad based annular bulging and hypertrophic facet changes at the L2-3 level that resulted in some moderate right lateral stenosis and possible impingement on the L3 nerve root. (EX-11, pp. 7-8). In addition, Claimant's MRI showed a disc extrusion as well as degenerative facet joint hypertrophic changes at the L3-4 level which Dr. Drazner noted might be impinging on either L4 or L5 nerve roots. Claimant's MRI also showed severe hypertrophic changes and ligamentum flavum hypertrophy at the L4-5 level. (EX-11, p. 8). According to Dr. Drazner, all of these MRI findings are consistent with degenerative disc disease which causes severe canal and lateral recess stenosis. (EX-11, pp. 6-9).

Degenerative disc disease, according to Dr. Drazner, begins in every individual in the late teens or early twenties. The disease progresses as the body loses proteoglycan, a "filler" substance between cells, from the collagen fibers of the outer rings of lumbar discs. (EX-11, p. 7). Loss of proteoglycan causes bulging or drying of lumbar discs after which facet joints in the vertebrae become closer to one another resulting in arthritic and hypertrophic changes. (EX-11, pp. 7-8). Many individuals with widespread degenerative disc disease are asymptomatic and, consequently, do not complain of pain. However, some individuals who suffer from widespread degenerative disc disease are symptomatic. (EX-11, pp. 26-27).

Since Claimant's MRI showed annular bulging and hypertrophic changes, Dr. Drazner concluded Claimant does not suffer from an acute injury; but, rather suffers from widespread degenerative disc disease. (EX-11, pp. 7-9; CX-1, p. 20). However, Dr. Drazner acknowledged that had Claimant immediately complained of pain after changing the truck tire on May 6, 2005, he would have evaluated Claimant differently since under those circumstances there would have been a mechanism of injury to review. (EX-11, pp. 10-11). Ultimately, Dr. Drazner diagnosed

Claimant as suffering from multilevel degenerative disc disease. (EX-11, p. 21; CX-1, pp. 19-20).

Dr. Drazner opined that an individual suffering from extensive degenerative disc disease similar to Claimant's, usually has a labor intensive employment history which serves as a significant mechanism of injury. (EX-11, p. 9). Dr. Drazner found Claimant not to have a major mechanism of injury nor a vast change in functional status. Therefore, Dr. Drazner questioned whether Claimant even suffered a work-related injury. (EX-11, p. 10). Dr. Drazner was also skeptical of Claimant's subjective complaints of pain since Claimant sat comfortably without changing positions while talking at length with him. (EX-11, pp. 18-19, 22, 27-28). Dr. Drazner acknowledged, however, that it is common for patients with back injuries to have fluctuating symptoms. (EX-11, p. 25). Dr. Drazner also acknowledged that the extent of Claimant's degenerative condition would have made him more susceptible to injury during his employment in Iraq. (EX-11, pp. 25-26, 29-30). Dr. Drazner opined that had Claimant suffered a work-related injury that aggravated his degenerative disc disease, the aggravation had resolved by the time he examined Claimant on December 13, 2005. (EX-11, p. 30). Although Dr. Drazner agreed that had he had more than one opportunity to physically examine Claimant, his opinion regarding the resolution of any aggravated condition might be different. (EX-11, p. 30-31).

Dr. Drazner reviewed Claimant's treatment records from Dr. Brandecker. (EX-11, p. 11). He determined Dr. Brandecker's only positive finding from his examination of Claimant on June 21, 2005 was that on straight leg raising on the right Claimant complained of pain. (EX-11, pp. 12-13). Other than this finding, Dr. Drazner concluded Dr. Brandecker offered a predominantly unremarkable examination of Claimant. (EX-11, p. 13). Dr. Drazner also concluded that while the epidural space is a contiguous space, Dr. Brandecker did not administer epidural injections in any specific area where Claimant complained of pain. (EX-11, pp. 13-15). Therefore, Dr. Drazner opined that there would be no expected benefit from the injections. (EX-11, p. 15). Dr. Drazner also noted that after an examination of Claimant on October 4, 2005, Dr. Brandecker found Claimant had completely normal lumbar range of motion and had reached maximum medical improvement ("MMI"). (EX-11, pp. 15-16). Dr. Brandecker noted, however, that Claimant was limited from working due to an upcoming total hip replacement. (EX-11, p. 17).

Besides noting Dr. Brandecker found Claimant to have completely normal lumbar range of motion and to have reached MMI, Dr. Drazner also noted Dr. Brandecker released Claimant to full duty on November 1, 2005, but retracted the release on November 9, 2005 at Claimant's request. (EX-11, pp. 17-18). Instead of releasing Claimant to full duty, Dr. Brandecker stated Claimant had lumbar stiffness that would prevent him performing normal work activities. (EX-11, p. 17). According to Dr. Drazner, lumbar stiffness in a man of Claimant's age and weight is to be expected and does not warrant a finding of disability. (EX-11, pp. 17-18).

Dr. Drazner concluded from his examination of Claimant and from his review of Claimant's medical records, particularly Claimant's treatment records from Dr. Brandecker that Claimant was able to be released to work up to at least medium type work on October 4, 2005. (EX-11, pp. 21-22). Dr. Drazner also concluded Claimant did not require surgical intervention mainly because Dr. Drazner found Claimant to be a poor surgical candidate due to multiple medical problems including obesity and diabetes and since he found Claimant to be completely

functional. (EX-11, pp. 22-23; CX-1, p. 20). However, Dr. Drazner acknowledged that as Claimant's degenerative disc disease progresses surgical intervention might be necessary. (EX-11, pp. 23-24). Dr. Drazner also acknowledged that had Claimant had radicular pain and numbness consistent with a herniated disc, surgical intervention might be required. (EX-11, pp. 28-29).

Deposition Testimony of Robert P. Hayes, M.D.

Robert P. Hayes, M.D. is an orthopaedic surgeon who earned a bachelor's degree from Norwich University and a doctor of medicine from University of Cincinnati Medical School. (CX-17, pp. 4, 21). Dr. Hayes completed an orthopaedic residency in the University of New Mexico system. (CX-17, pp. 5, 21). Currently, Dr. Hayes maintains a medical and consultant group in Dallas, Texas where he has practiced medicine for approximately twenty-two (22) years. (CX-17, pp. 5, 22).

Dr. Hayes examined Claimant at the Department of Labor's request and concluded Claimant suffers from degenerative arthritis of his back, a disc herniation at the L3-4 level, a broad based bulging disc at the L2-3 level, spinal stenosis at the L4-5 level, and spondylolysis. (CX-17, pp. 5, 9, 25-26). Dr. Hayes based his conclusion on his physical examination of Claimant as well as on Claimant's medical records, including a MRI of Claimant's back. (CX-17, pp. 7-9). Dr. Hayes noted in his examination of Claimant that Claimant had reduced range of motion and showed signs of irritation of his sciatic nerve on straight leg raising of his right leg. (CX-17, pp. 7-9, 24-25).

Dr. Hayes determined Claimant's injury as described to him, specifically, changing a tire in a hostile area, likely aggravated Claimant's degenerative condition, causing him to suffer back pain. (CX-17, pp. 10, 16, 25-26; CX-1, pp. 23-24). Dr. Hayes also noted that under duress an individual might not immediately recognize pain since under such circumstances the individual is focused only on completing the task at hand. (CX-17, pp. 17-18, 11-13, 25). According to Dr. Hayes, Claimant has not reached MMI and should pursue surgical correction of his back condition. (CX-17, pp. 9, 25-26; CX-1, pp. 23-24). Additionally, Dr. Hayes found Claimant could not return to work as a truck driver at this time, but felt he might be able to perform light office work where he can change postural positions while working. (CX-17, pp. 10, 26).

IV. DISCUSSION

A. Argument of the Parties

Claimant contends he suffered an injury to his back working in a zone of special danger while he was employed as a convoy commander in Iraq by Employer/Carrier. Claimant further contends that since he was injured in a zone of special danger while working for Employer/Carrier, Employer/Carrier is responsible for providing him with compensation and benefits under the Act. Employer/Carrier terminated Claimant's temporary total disability

compensation on November 1, 2005 after Dr. Brandecker released Claimant to full duty. Employer/Carrier has also refused to pay for Claimant to undergo back surgery.

Claimant maintains that his release to full duty was made in error, that he has not reached MMI, and that the recommended back surgery is reasonable and necessary treatment for his work-related injury. Therefore, Claimant argues since he was injured while working for Employer/Carrier, has not reached MMI and was mistakenly released to full duty, he is entitled to present and continuing temporary total disability compensation retroactive to November 1, 2005 as well as entitled to undergo the recommended back surgery.

Employer/Carrier contends Claimant did not suffer a work-related injury. Employer/Carrier maintains that since Claimant did not manifest any physical symptoms of an acute injury on May 6, 2005 after he changed his truck's tire, Claimant has not established a causal relationship between his back pain and his changing of the truck tire. Employer/Carrier further maintains that the report and testimony provided by Dr. Drazner show that Claimant's back pain and decreased range of motion are the result of degenerative disc disease, morbid obesity and an unrelated hip replacement surgery. Thus, Employer/Carrier argues that Claimant did not suffer a work-related injury on May 6, 2005, nor does he presently suffer from an ongoing work-related injury. Accordingly, Employer/Carrier maintains Claimant is not entitled to any compensation or benefits under the Act.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. ***Banks v. Chicago Grain Trimmers Association, Inc.***, 390 U.S. 459, 467 (1968); ***Louisiana Insurance Guaranty Ass'n v. Bunol***, 211 F.3d 294, 297 (5th Cir. 2000); ***Hall v. Consolidated Employment Systems, Inc.***, 139 F.3d 1025, 1032 (5th Cir. 1998); ***Atlantic Marine, Inc. v. Bruce***, 551 F.2d 898, 900 (5th Cir. 1981); ***Arnold v. Nabors Offshore Drilling, Inc.***, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. ***Banks v. Chicago Grain Trimmers Association, Inc.***, 390 U.S. at 467; ***Mijangos v. Avonldale Shipyards, Inc.***, 948 F.2d 941, 945 (5th Cir. 1991); ***Huff v. Mike Fink Restaurant, Benson's Inc.***, 33 BRBS 179, 183 (1999).

Here, based on the record as a whole and my observations of the witness, I am convinced that Claimant is a sincere and honest witness. Overall, I was very impressed by Claimant's sincerity and testimony. I was also impressed with the sincerity and records of Dr. McDonough as well as the sincerity, testimony, and records of Dr. Hayes. I was not impressed, however, by Dr. Drazner's records and testimony concerning Claimant's condition.

Dr. Drazner opined on the one hand that had Claimant suffered a work-related injury that aggravated his degenerative disc disease it had resolved by December 13, 2005. Yet, Dr. Drazner conceded on the other hand that his conclusion regarding any resolution of an

aggravated condition might be different had he had more than one occasion to examine Claimant. While such a concession does not completely contradict Dr. Drazner's ultimate conclusion that Claimant suffers from multilevel degenerative disc disease, the concession creates an ambiguity as to Claimant's condition: he either no longer suffers from an aggravated injury or he might suffer from an aggravated injury. This ambiguity makes it impossible in case like the instant case where causation is in issue to fully credit the testimony and records of Dr. Drazner.

Moreover, I was not impressed by Dr. Brandecker's records. Although Dr. Brandecker submitted a release to full duty on November 1,2005, 7 days later he retracted the release saying that due to lumbar stiffness and numbness Claimant had work limitations and since a functional capacity evaluation had not been performed he could not assign a type of work to Claimant. I am unable to credit Dr. Brandecker's assertion that Claimant had reached MMI on October 4, 2005 as the record clearly indicates that Claimant and Dr. McDonough were planning surgical intervention to improve his condition.

C. Section 20(a) Presumption - Establishing a *Prima Facie* Case

Under Section 2(2) of the Act, injury is defined as an accidental injury or death arising out of or in the course of employment. 33 U.S.C. § 902(2). Section 20(a) provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. ***Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter***, 227 F.3d 285, 287 (5th Cir. 2000); ***O'Kelly v. Department of the Army***, 34 BRBS 39, 40 (2000); ***Kier v. Bethlehem Steel Corp.***, 16 BRBS 128, 129 (1984). Ordinarily, in cases concerning a traumatic injury, a claimant need only show conditions existed at work that could have caused the injury. ***Leblanc v. Port Cooper/T. Smith Stevedoring Co., Inc.***, 130 F. 3d 157, 160-161 (5th Cir. 1997). However, under the DBA, a claimant need not establish a causal relationship between his employment and the accident that occasioned his injury. ***O'Leary v. Brown-Pacific-Maxon***, 340 U.S. 504, 506-507 (1951). Rather, all a Claimant must prove is that the "obligations or conditions" of his employment created a "zone of special danger" out of which the injury or death arose. ***Kalama Services, Inc., v. Director, OWCP***, 354 F. 3d 1085, 1091 (9th Cir. 2003) (citing, ***O'Leary v. Brown-Pacific-Maxon***, 340 U.S. at 507); ***O'Keeffe v. Smith, Hinchman & Grylls Associates***, 380 U.S. 359 (1965); ***O'Leary v. Brown-Pacific-Maxon, Inc.***, 340 U.S. 504 (1951); ***Gillespie v. General Electric Co.***, 21 BRBS 56 (1988).

To show harm or injury a claimant must show that something has gone wrong with the human frame. ***Crawford v. Director, OWCP***, 932 F.2d 152, 154 (2nd Cir. 1991); ***Wheatley v. Adler***, 407 F.2d 307, 311-12 (D.C.Cir. 1968); ***Southern Stevedoring Corp. v. Henderson***, 175 F.2d. 863, 866 (5th Cir. 1949). Under the aggravation rule, an entire disability is compensable if

a work related injury aggravates, accelerates, or combines with a prior condition. ***Gooden v. Director, OWCP***, 135 F.3d at 1069 (5th Cir. 1998); ***Kubin v. Pro-Football, Inc.***, 29 BRBS 117, 119 (1995). However, an injury cannot be found absent some work-related accident, exposure, event or episode. ***Adkins v. Safeway Stores, Inc.***, 6 BRBS 513, 517 (1978).

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what might have been.'" ***Wheatley v. Adler***, 407 F.2d at 313. A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. ***Hampton v. Bethlehem Steel Corp.***, 24 BRBS 141, 144 (1990); ***Golden v. Eller & Co.***, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980). However, uncorroborated testimony by a discredited witness is insufficient to establish that an injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. ***Bonin v. Thames Valley Steel Corp.***, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence a condition existed at work which could have cause his depression); ***Alley v. Julius Garfinckel & Co.***, 3 BRBS 212, 214-15 (1976); ***Smith v. Port Cooper/T. Smith Stevedoring Co., Inc.***, 17 BRBS 721, 727 (1985) (ALJ).

Once a *prima facie* case is established, a presumption is created under Section 20(a) that the claimant's injury or death arose out of employment. ***Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter***, 227 F.3d at 287. A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20(a) presumption. Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." ***U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP***, 455 U.S. 608 (1982). *See also,* ***Bludworth Shipyard Inc., v. Lira***, 700 F.2d 1046, 1049 (5th Cir. 1983); ***Devine v. Atlantic Container Lines***, 25 BRBS 15, 19 (1990).

To rebut the Section 20(a) presumption, an employer must present substantial evidence that a claimant's condition is not caused by a work related accident or that the work related accident did not aggravate claimant's underlying condition. ***Conoco, Inc. v. Director, OWCP*****,** 194 F.3d 684, 687-88 (5th Cir. 1999); ***Gooden v. Director, OWCP***, 135 F. 3d 1066, 1068 (5th Cir. 1998); ***Port Copper/T. Smith Stevedoring Co. v. Hunter***, 227 F. 3d at 287. The Fifth Circuit, the Circuit in which this case arose, has held that "when an employer offers sufficient evidence to rebut the [Section 20(a)] presumption the kind of evidence a reasonable mind might accept as adequate to support a conclusion only then is the presumption overcome." ***Noble Drilling v. Drake*****,** 795 F.2d 478, 481 (5th Cir. 1986); ***See also, Ortco Contractors, Inc., v. Charpentier,*** 332 F.3d 283, 290 (5th Cir. 2003) (stating that the requirement is less demanding than the preponderance of the evidence standard); ***Conoco, Inc., v. Director, OWCP***, 194 F.3d at 690 (stating that the hurdle is far lower than a ruling out standard); ***Stevens v. Todd Pacific Shipyards Corp.*****,** 14 BRBS 626, 628 (1982), *aff'd mem*., 722 F.2d 747 (9th Cir. 1983) (stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); ***Holmes v. Universal Maritime Serv. Corp.*****,** 29 BRBS 18, 20 (1995) (stating that the unequivocal testimony of a physician that no

relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.).

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. ***Del Vecchio v. Bowers*****,** 296 U.S. 280, 286-87 (1935); ***Port Cooper/T Smith Stevedoring Co., v. Hunter*****,** 227 F.3d 285, 288 (5th Cir. 2000); ***Holmes v. Universal Maritime Serv. Corp*****.,** 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the issue of causation. If the record evidence is evenly balanced, then employer must prevail. ***Director, OWCP, v. Greenwich Collieries*****,** 512 U.S. 267, 281 (1994). In this case, the record indicates Claimant was employed by Employer to transport fuel from Kuwait to military bases throughout Iraq. Particular regions of Iraq, namely, Baghdad and Northern Iraq, were considered war zones and known hostile areas. Employer's employees, including Claimant, were required to wear flak vests and helmets while in Iraq.

On May 6, 2005, the front steer tire of Claimant's tanker truck blew out while Claimant and the remainder of his convoy were en route to Kuwait from Baghdad. The route upon which the convoy was traveling was the same route where Claimant's convoy commander had been fatally injured during an attack on his convoy. On May 6, 2005, Claimant stopped his convoy and exited his truck in order to change its tire. Claimant physically exerted himself more so than he would have under ordinary circumstances when he changed the tire because he believed his convoy was going to come under attack as one of the convoy's military escorts had spotted an Iraqi truck to the right of the convoy and had prepared to fire at the truck. Claimant developed severe back pain after he overexerted himself in changing the tanker truck tire.

Based on the record, I find Claimant's employment in a war zone and known hostile area during which he was required to wear body armor sufficient to establish a zone of special danger. Claimant established a Section 20(a) *prima facie* claim for compensation. While it may be argued that Employer rebutted this claim by testimony from Drs. Drazner and Brandecker, I am convinced by weighing all the evidence including credible testimony from Claimant and Dr. Hayes together with medical records from Dr. McDonough that Claimant established causation by a preponderance of credible evidence.

D. Nature and Extent of Injury and Date of Maximum Medical Improvement

Claimant seeks reinstatement of temporary total disability compensation and associated medical benefits as a result of his May 6, 2005 workplace injury. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. ***Watson v. Gulf Stevedore Corp.***, 400 F.2d 649 (5th Cir. 1968); ***Seidel v. General Dynamics Corp.***, 22 BRBS 403, 407 (1989); ***Stevens v. Lockheed Shipbuilding Co.***, 22 BRBS 155, 157 (1989). The traditional approach for

determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement ("MMI").

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence**.** ***Hite v. Dresser Guiberson Pumping***, 22 BRBS 87, 91 (1989); ***Care v. Washington Metro Area Transit Authority***, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. ***Lozada v. General Dynamics Corp.***, 903 F.2d 168 (2d Cir. 1990); ***Sinclair v. United Food & Commercial Workers***, 13 BRBS 148 (1989); ***Trask v. Lockheed Shipbuilding & Construction Co.***, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, (***Leech v. Service Engineering Co.***, 15 BRBS 18 (1982)), or if his condition has stabilized. ***Lusby v. Washington Metropolitan Area Transit Authority***, 13 BRBS 446 (1981). Here, Dr. Brandecker was the only physician to conclude that Claimant had reached MMI a conclusion which based on the record I am unable to fully credit. Drs. McDonough and Hayes, on the other hand, determined Claimant required surgical intervention to improve his condition. More importantly, Dr. Hayes concluded Claimant had not yet reached MMI. Since my review of the record does not reveal any facts relevant to a conflicting determination, I find Claimant has not reached MMI.

a. *Prima Facie* Case – Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. However, case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d at 1038; ***P&M Crane Co., v. Hayes***, 930 F.2d at 429-30; ***SGS Control Serv. v. Director, OWCP***, 86 F.3d 438, 444 (5th Cir. 1996). Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. ***Elliot v. C&P Telephone Co.***, 16 BRBS 89 (1984) (emphasis added). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. ***Walker v. Sun Shipbuilding & Dry Dock Co.***, 19 BRBS 171 (1986).

Here, the record is clear that Claimant cannot perform his past work as a convoy commander or tanker truck driver. Drs. McDonough, Brandecker, Drazner, and Hayes each concluded that, at the least, Claimant suffers from a disc disease. Whereas Dr. McDonough expressed no opinion as to the type of work Claimant could perform and Dr. Brandecker reserved his opinion pending completion of a functional capacity evaluation, both Drs. Drazner and Hayes concluded Claimant could work but not without restrictions. Dr. Drazner recommended restricting Claimant to up to medium duty while Dr. Hayes recommended Claimant be restricted to performing light office work where he could change postural positions while working.

As a convoy commander and tanker truck driver, Claimant was required to wear a flak vest which weighs between forty (40) and sixty (60) pounds and a helmet. Claimant was also required to drive or ride along in tanker trucks across Iraq on less than smooth roads. It is clear

that considering the medical evaluations of Drs. McDonough, Brandecker, Drazner, and Hayes, Claimant's work restrictions as specified by Drs. Drazner and Hayes, including an ability to change postural positions while working, and Claimant's job requirements, Claimant cannot perform his past work as a convoy commander or tanker truck driver which involved medium to heavy work. Therefore, I find Claimant has established a *prima facie* case of temporary and total disability. Accordingly, Claimant is entitled to total and temporary disability compensation and associated medical benefits as a result of his May 6, 2005 workplace injury.

E. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the employer, the expense must be both reasonable and necessary. ***Pernell v. Capitol Hill Masonry***, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. ***Turner v. Chesapeake & Potomac Tel. Co.***, 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. ***Ballesteros v. Willamette Western Corp.***, 20 BRBS 184, 187. Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. ***Weber v. Seattle Crescent Container Corp.***, 19 BRBS 146 (1980); ***Wendler v. American National Red Cross***, 23 BRBS 408, 414 (1990).

In the instant case, Claimant's treating physician, Dr. McDonough, recommended Claimant undergo a L3 to L5 decompression and L4-5 fusion if his condition remained refractory to conservative treatment. Claimant's condition remained refractory to conservative treatment. Therefore, Dr. McDonough obtained Claimant's informed consent and schedule Claimant for surgery in January of 2006. However, the surgery appointment was cancelled after Employer/Carrier refused to authorize the treatment.

Besides Dr. McDonough recommending surgical intervention, Dr. Hayes, the independent medical examiner appointed by the Department of Labor, also recommended Claimant undergo surgery to improve his condition. As Claimant has not reached MMI and two (2) qualified physicians have determined Claimant would benefit from surgical intervention, I find the recommended surgery reasonable and necessary treatment of Claimant's work-related

back injury.

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six percent per annum is assessed on all past due compensation payments. ***Avallone v. Todd Shipyards Corp.***, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. ***Watkins v. Newport News Shipbuilding & Dry Dock Co.***, *aff'd in pertinent part and rev'd on other ground*, ***Newport News v. Director, OWCP***, 594 F.2d 986 (4th Cir. 1979). However, the Board has now concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961. This order incorporates by reference this statute and provides for its specific administrative application by the District Director." ***See***, ***Grant v. Portland Stevedoring Company***, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney's Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by Claimant's Counsel. Counsel is hereby allowed thirty (30) days from the date of service of this Decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. CONCLUSION

Claimant is and has been temporarily and totally disabled since May 26, 2005. Accordingly, Claimant is entitled to temporary and total disability compensation and associated medical benefits, including the recommended back surgery, as a result of his workplace injury. Therefore, Employer/Carrier is liable to Claimant for temporary and total disability compensation from May 26, 2005 to present and continuing based on an average weekly wage of $1,675.00.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from May 26, 2005 to present and continuing based on an average weekly wage of $1,675.00.

2. Employer/Carrier shall be entitled to a credit for all previous compensation paid to Claimant.

3. Employer/Carrier shall pay Claimant for all reasonable medical care and treatment arising out of his work-related injury pursuant to Section 7(a) of the Act, including the recommended back surgery.

4. Employer/Carrier shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961.

5. Claimant's Counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

6. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE